be deemed to be compliance with the provisions of this Enactment."

The point is that by section 16 which reads

"16. Notwithstanding anything in this Enactment or in any other written law, no admitted right or conceded privilege shall be transferred by way of grant, sale, lease, charge or other manner, except succession on death, without the written consent of the Minister."

the prohibition against a transfer of the licence is not absolute but may be waived with the written consent of the Minister. This point is connected with the cancellation of clause 17 which generally preserves the official disapproval against transfers. The clause reads as follows:

"Clause 17:

The licensee shall not assign the benefits of this licence or assign transfer or part with any right or privilege thereunder without the previous consent in writing of the Government under the hand of the Permanent Secretary to the Minister first had and obtained."

The cancellation was by a rubber-stamp bearing the word "deleted" and signed obviously, by a comparison of the signatures, by the conservator who issued the licence.

This court has not been advised whether there is any usual form of a licence agreement in use, but it is first to be observed that a licence agreement or a licence under section 15 would be entered into by the Minister in charge of forests. That requirement is missing in the licence this court has to construe. But the matter goes beyond any uncertainty when a comparison is made with Form I in Schedule III of the Forests Rules, 1969. It is beyond doubt and argument a licence in Form I. It is therefore not a licence agreement or a licence issued under section 15 but a licence issued under section 24 of the Forests Enactment, 1968. It is not transferable and the purported deletion of the non-transferable clause 17 by the Government is beyond his powers and is null and of no effect.

With respect therefore, I agree with the learned judge in his conclusions and would dismiss the appeal.

Suffian L.P. concurred.

Appeal dismissed.

Solicitors: *W. K. Loo & Co.; Shelly Yap & Co.*

UNITED OVERSEAS BANK LTD. v. JOO HIN LEONG

[O.C.J. (Mohamed Zahir J.) February 4, 1978]
[Kuala Trengganu — Civil Suit No. 81 of 1970]

Practice and Procedure — Consent judgment — Application for stay of execution — Application made by motion in same suit — Wrong procedure — Special Circumstances — R.S.C., 1957, O. 28 & O. 42 r. 17(b).

The plaintiff had in 1971 obtained a consent judgment against the defendant for the sum of $79,669.49 and interest thereon. Four years later in 1975 the defendant applied by motion for stay of execution of the judgment on the ground that the plaintiff had agreed to allow a deduction of $10,000 from the principal sum and that the plaintiff had agreed to waive interest on the principal sum from 1966 to the date of judgment.

Held: (1) the defendant in this case merely claimed that there was an alleged agreement between him and the plaintiff before the judgment. This did not constitute special circumstances to justify the court in exercising its power under Order 42 rule 17(b) of the Rules of the Supreme Court;

(2) to allow the defendant's application in this case would mean that there would be a permanent stay of execution and this was not the intention of Order 42 rule 17(b);

(3) the defendant should in this case file a fresh suit for a declaration that there was already satisfaction of the judgment of the court and then apply for stay of execution pending determination of the issue.

Cases referred to:-

(1) *Ainsworth* v. *Wilding* [1896] 1 Ch. 673.
(2) *Kinch* v. *Walcott & Ors.* [1929] A.C. 482, 493, 494.
(3) *Kerpa Singh* v. *Bariam Singh* [1966] 1 M.L.J. 38.

CIVIL SUIT.

A. Wilson for the applicant.

C.V. Das for the respondent.

Mohamed Zahir J.: The Defendant is, by way of Notice of Motion, seeking for stay of execution of the Order of this Honourable Court given against him on May 4, 1971. This was a consent order made in Chambers where the defendant was ordered to pay to the plaintiff the sum of $79,669.49 and interest thereon from the 1st day of September, 1970 at the rate of 95 cents per $100 per mensem with monthly rests until judgment and interest at the rate of 6% thereafter to the date of realisation and costs.

After more than four years, the defendant is now saying that the plaintiff's right to call up the balance due on the judgment be stayed. The defendant filed an affidavit dated September 10, 1975 alleging as follows:—

(a) that the plaintiff had agreed to allow a deduction of $10,000 from the principal sum;

(b) that the plaintiff had agreed to waive interest on the principal sum from 1966 to date of judgment.

The plaintiff in their affidavit dated October 28, 1975 affirmed by their Chief Manager and Secretary denied such agreement.

Mr. Das, counsel for the plaintiff, made a preliminary submission that the defendant's action in bringing the application by way of motion in the same suit is wrong in procedure and submitted that the defendant should have filed a separate suit.

The general rule is that a judgment is conclusive and binding on the defendant unless —

(a) it is appealed against and the appeal is allowed; or

(b) there is a genuine mistake in the recording of the judgment and an application is made under the slip rule, Order 28 rule 11 to amend the same.

But there is no right of appeal in a consent judgment.

What the defendant is now asking in effect is that the consent judgment should be $10,000 less and also less by the deduction of interest for the year 1966 until May 4, 1971, the date of judgment. The defendant alleged that before entering into the consent judgment the parties had agreed to certain terms which in effect would make the sum due less than what appeared in the judgment. The defendant is asking for a stay of execution.

The question before the court is whether the procedure adopted by the defendant is proper. At this stage, I do not think I should go into the merits of the parties' respective claims as to whether the plaintiff's or the defendant's allegation is to be believed.

In *Ainsworth* v. *Wilding*[1] it was held that after a judgment has been passed and entered — even where it has been taken by consent and under a mistake — the court cannot set it aside otherwise than in a fresh action brought for the purpose unless (1) there has been a clerical mistake or an error arising from an accidental slip or omission within the meaning of the Rules of the Supreme Court, 1883, Order xxviii, rule 11, or (2) the judgment as drawn up does not correctly state what the court actually decided and intended to decide — in either of which cases the application may be made by motion in the action.

In that case a judgment "by consent declare" that Wilding's mortgage should stand as a security for the amount and that certain accounts and an enquiry should be taken. Wilding thereafter served notice of motion that the court's order be set aside and the action may be reheard on the ground that the consent given was given by mistake.

In the case of *Kinch* v. *Walcott & Ors.*[2] it was held that a plaintiff in an action based upon charges which he has withdrawn by a consent order in a previous action between the parties is estopped by the order and cannot effectively plead in reply that his consent was induced by fraudulent concealment. It was held that an order by consent is binding unless and until it has been set aside in proceedings constituted for that purpose. Lord Blanesburgh on page 494 said:

"At the best, so far as the appellant is concerned, the order embodies an agreement which possibly may still remain voidable at his instance. But that means that the order stands until it has been effectively set aside."

Mr. Wilson, counsel for the defendant, replied that the defendant's application is not to set aside the consent judgment and he conceded that a consent judgment could only be set aside by a fresh suit. He admitted the validity of the consent order, but pointed out that he was making the application under Order 42 rule 17(b) of the Rules of the Supreme Court which reads as follows:

"(b) the court or a judge may, at any time after the time of giving judgment, or making the order, stay execution until such time as it or he thinks fit."

Mr. Wilson argued that there were facts which amounted to special circumstances to enable the court granting stay of execution and he quoted the *Annual Practice* 1959 page 1016 where the following illustrations are not considered special circumstances by the court:—

"(a) Where a plaintiff had obtained two judgments against the defendant for £32 and £41 respectively, and served a bankruptcy notice on the defendant who tendered the £32, which the plaintiff refused to accept, it was held that the judge had no power to make an order to stay all proceedings on the judgment for £32, as he had done. the result of such an order being to interfere with the jurisdiction of the Court of Bankruptcy (*Brook* v. *Emerson* (1906), 95 L.T. 821; C.A.).

(b) An order for sale of the mortgaged property is not in equity equivalent to a stay of execution on a personal judgment for the mortgage debt so as to prevent a bankruptcy notice issuing (*Re Kelday* (1888) 36 W.R. 585).

(c) Neither a garnishee order under which nothing has been received amount to such a stay of execution (*Re Renison*, [1913] 2 K.B. 300).

(d) Neither allegations of misdirection, or that there was no evidence to support the verdict or judgment, or that it was against the weight of evidence, are not sufficient for stay of execution (*Monk* v. *Bartram*, [1891]1 Q.B. 346)."

What then constitute special circumstances? *The Supreme Court Practice 1976* Vol. 1 at page 730 reads as follows:

"The grounds upon which the court can exercise this power are either that there are special circumstances which render it inexpedient to enforce the judgment or order for the payment of money or that the applicant is unable from any cause to pay the money."

On page 731 of the same book the test is laid down as follows:

"The tests to be applied to stay execution under this rule are quite different from those applicable to proceedings under Order 14, and therefore a stay of execution of a judgment, including a foreign judgment duly registered in England, will not ordinarily be granted simply because the defendants bring a cross-claim in another action against the plaintiff, at any rate in the absence of special circumstances rendering it inexpedient to enforce the judgment (*Wagner* v. *Laubscher Brothers & Co.* [1970] 2 Q.B. 313, C.A.)."

In *Wagner's* case, the fact that the defendants brought a cross claim in another action against the plaintiff over the same subject matter does not amount to special circumstances.

In the case before us the defendant is not claiming that he was unable to pay the money but that there was an alleged agreement between him and the plaintiff before the judgment. This to my mind does not constitute special circumstance for, applying the test in *Wagner's* case, even if there is a cross action against the plaintiff it will not constitute special circumstances rendering it inexpedient to enforce the judgment. In the instant case there is not even a fresh suit seeking to determine the alleged claim by the defendant that there was an agreement before the judgment.

To allow the defendant's application herein will mean there would be a permanent stay of execution and I do not think this is the intention of Order 42 rule 17(b). Stay of execution with its ordinary meaning must be of a temporary nature until for example the completion of certain events or fulfilling of certain acts or conditions. It means the full judgment is to be paid only it is deferred but not to be reduced where for instance payment by instalments was allowed or

where there was a claim by a third party that the property does not belong to the defendant but belongs to him, the third party. Order 42 rule 17(b) stipulates that the court may stay execution until such time as it thinks fit. I do not see in this rule any intention for granting a permanent stay which will render the judgment ineffective or will frustrate the order of the court.

Mr. Wilson quoted *Kerpa Singh* v. *Bariam Singh*[3] where there was a bankruptcy proceeding where it was held that the creditor in accepting the tender by cashing the cheque and retaining the money must be taken to have agreed to discharge the debtor from any further liability. It must be distinguished as in that case the defendant debtor raised the issue of repayment and satisfaction in bankruptcy proceedings by seeking to set aside a bankruptcy notice. It was not by way of stay of execution but in a separate action where evidence could be taken as if it were under a fresh suit. In the instant case the defendant should file a fresh suit for a declaration that there was already satisfaction of the judgment of the court and then apply for stay of execution pending determination of the issue. This application will then be considered by the court on its merits as a stay if granted will be temporary pending the final disposal of the suit.

I therefore dismiss the motion with costs.

Motion dismissed.

Solicitors: *Wilson & Co.; Shook Lin & Bok.*

PUBLIC PROSECUTOR v. LIM WOON CHONG & ANOR.

[O.Cr.J. (Arulanandom J.) July 18, August 8-13, September 12, November 14-15, December 13, 1977, January 16-17 and March 22, 1978]

[Ipoh — Perak Criminal Trials Nos. 6 and 7 of 1977]

Criminal Law and Procedure — Charge of murder — Identification of accused — Discovery of fact as result of information given by accused — Cautioned statement of accused — Misbehaviour of accused at trial — Duty of counsel — Essential (Security Cases) Regulations, 1975 — Trial — Evidence Act, 1950, s. 27 — Criminal Procedure Code (F.M.S. Cap. 6), s. 7 — Penal Code, ss. 34 & 302.

In this case the accused were jointly charged that they committed murder of Tan Sri Koo Chong Kong, the Chief Police Officer, Perak and his driver, offences under section 302 read with section 34 of the Penal Code. At the trial the first accused was positively identified by a witness as one of the two persons involved in the killing. The evidence also showed that as a result of information by the second accused pistols and guns were discovered by the police and that expert evidence showed that the bullets which killed the Chief Police Officer and his driver were fired from the two pistols discovered. The accused had made cautioned statements in which they stated they had been instructed by an agent to assassinate the Chief Police Officer.

Held: (1) on all the evidence considered together — the first accused having been identified as one of the two persons involved in the shooting of the Chief Police Officer, the discovery of their pistols and magazines by the police as a result of information given by the second accused, the chemist's evidence that the bullets which killed the Chief Police Officer and his driver were fired from the two pistols recovered — there was only one inescapable conclusion, that it was the two accused who shot and killed the Chief Police Officer and his driver;

(2) the cautioned statements of the accused were properly taken and made voluntarily without any threat, promise or inducement and therefore they should be admitted. The cautioned statements provided all the frills and embellishments to establish motive to give details of preparations for the offence and of all attempts to prevent being apprehended and punished for their offence;

(3) when called for their defence the accused elected to say nothing and therefore the court had no option but to record convictions against them.

Cases referred to:-

(1) *Government of Malaysia* v. *Mahan Singh* [1975] 2 M.L.J. 155.

(2). *Public Prosecutor* v. *Khong Teng Khen & Anor.* [1976] 2 M.L.J. 166.

(3) *Pulukuri Kotayya* v. *King Emperor* (1946-1947) 74 I.A. 77; A.I.R. 1947 P.C. 67.

CRIMINAL TRIALS.

Abu Talib bin Othman, Senior Federal Counsel, (*Wan Abdul Majid*, Deputy Public Prosecutor, with him) for the Public Prosecutor.

Karpal Singh (subsequently discharged) for the first accused.

S.T. Lee (subsequently discharged) for the second accused.

S.P. Annamalai (subsequently discharged) for second accused.

W.E. Balasingam, amicus curiae.

Arulanandom J.: When this trial ended on the 17th day of January, 1978, I did not give my judgment immediately and I stated that as this case was of great public importance and interest I considered that I had to give a written judgment. The reason I said so was because unlike a straightforward criminal trial this had so many facets. When one uses the word 'facets' one immediately associates the word with diamonds and the sparkle and light which the many facets reflect. But unfortunately in this case it is the complete reverse for what is reflected here is not light or sparkle but darkness and evil. I shall therefore confine the first part of my judgment to dealing purely with the criminal charges and evidence before me.

The two accused were jointly charged on four charges, namely,

"First Charge:

That you jointly on the 13th day of November, 1975, at or about 12.55 p.m. at the junction of Ashby Road/Fair Park Road, in the District of Ipoh, in the State of Perak, in furtherance of the common intention of you all, did commit murder by causing the death of Tan Sri Koo Chong Kong, the Chief Police Officer, Perak, and that you have thereby committed an offence punishable under section 302 of the Penal Code read with section 34 of the said Code.

Second Charge:

That you jointly on the 13th day of November, 1975, at or about 12.55 p.m. at the junction of Ashby Road/Fair Park Road, in the District of Ipoh, in the State of Perak, in furtherance of the common intention of you all, did commit murder by causing the death of Yeong Peng Chong, Police Sergeant 5135, and that you have thereby committed an offence punishable under section 302 of the Penal Code read with section 34 of the said Code.

Third Charge:

That you jointly on the 13th day of November, 1975, at or about 1.40 p.m. in Kampong Pasir Pinji, in the District of